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No. 00-509

IN THE

Supreme Court of the United States

MARILYN ARONS, RUTH WATSON, AND PARENT INFORMATION CENTER OF NEW JERSEY, INC.,
Petitioners,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF DELAWARE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Delaware

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent Office of Disciplinary Counsel of the Supreme Court of the State of Delaware ("ODC") devotes virtually its entire opposition brief to defending the Supreme Court of Delaware's ruling that the Individuals with Disabilities Education Act ("IDEA") does not authorize non-lawyers to advocate on behalf of parents in IDEA hearings. But ODC never suggests that the issues presented in this case are not critically important to the tens of thousands of parents with disabled children who cannot find or afford lawyers to represent them when they have disputes with their school boards. Nor does ODC contest that the ruling below will deprive parents facing due process hearings of the only assistance that is available to them. And nowhere does ODC dispute that the ruling below squarely conflicts with the position of the United States Department of Education — the agency charged with IDEA's implementation — that IDEA authorizes non-lawyer representation. Stripped of its rhetoric, ODC's contention is that this case is not worthy of this Court's review because it and the Supreme Court of Delaware are correct about what IDEA means, and the United States Department of Education and petitioners are wrong. As we now explain, this Court should grant review because of the profound importance of this case to the administration of IDEA, and because the uncertainty engendered by the ruling below will impede the Act's uniform and effective implementation.

1. The Questions Presented Are Important.

This case involves the interpretation of a federal statute that governs the rights of over 8 million disabled children in the United States to an appropriate public education. *See Honig v. Doe*, 484 U.S. 305, 309 (1984). At the heart of the Act are its procedural "safeguards," and most fundamentally the right of parents to contest decisions by school boards that deny their

children an educational opportunity. Under the provision at issue, parties to IDEA due process hearings "shall be accorded," among other things, "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). Petitioners and the Department of Education contend that this language expressly authorizes non-lawyers, trained in the needs of disabled children, to advocate on behalf of disabled children and their parents in IDEA due process hearings. *See* Petition, at 11-16; Brief of the United States, *In re Arons,* No. 440, Del. Sup. Ct. (Dec. 1, 1999) at 18-21 (hereinafter "U.S. Amicus Br.").[1]

ODC makes a number of points in response, but the crux of its argument is that "although both categories of persons [lawyers and lay advocates] may 'accompan[y] and advise[]' parties to such hearings, this language does not require that the subject matter and content of the contemplated 'advice' be identical." Brief in Opposition at 9 (brackets in original, citation omitted). According to ODC, lawyers may represent parents, not because of section 1415(h)(1), but because "counsel have inherent and presumptive representational authority, while expert educational consultants do not," and hence lay experts like Petitioners are required to be no more than passive participants at due process hearings. *Id.* By this legerdemain, ODC essentially rewrites the Act to erase that part of section 1415(h)(1) that authorizes parents to have non-lawyer assistance at hearings.

ODC's argument, which was accepted in full by the Delaware Supreme Court (Pet. App. at A5-A7), is riddled with

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[1] For the convenience of the Court, copies of the United States' Amicus Brief have been lodged with the Clerk's office.

flaws. To begin with, section 1415(h) confers a number of rights on *parties,* including the right to present evidence, to call, confront, and cross-examine witnesses, to compel the attendance of witnesses, to have a written or verbatim record of the hearing, and to written findings of facts and decisions. Section 1415(h)(1) uses identical words to authorize lay experts and attorneys to act on behalf of parties at due process hearings. It neither distinguishes between the roles of attorneys and lay advocates, nor implies that their roles, authority, or responsibilities at due process hearings are any different. Moreover, accepting ODC's contention that attorneys have "inherent and presumptive representational authority" renders section 1415(h)(1)'s reference to "counsel," and much of the remainder of the provision, surplusage. And accepting ODC's argument would lead to the absurd conclusion that Congress authorized lay advocates to do no more than serve as ventriloquists at hearings, telling parents what questions to ask, what arguments to make, what exhibits to introduce, and otherwise orchestrating the parents' case. Nowhere does the ODC explain why Congress would have decreed such a bizarre result. In short, the idea that the Act contemplates separate roles for lawyers and lay advocates is the ODC's invention, unsupported by the text, structure, or history of section 1415(h).

The flaws in ODC's argument bring the need for this Court's review into sharp focus. The representational provision of IDEA lies at the very center of the Act's procedural guarantees, and its misreading by the Delaware Supreme Court jeopardizes the fulfillment of the Act's goal of empowering parents to challenge adverse school board decisions. Relying on the Department's longstanding construction of the Act, every state in the nation has, until now, permitted non-lawyer representation in IDEA proceedings. Lay representation has become the norm, as the undisputed facts of this case illustrate. The parents that Petitioners assisted had nowhere else to turn.

Although the parents "diligently looked for legal counsel," none "could find an attorney willing to represent them on a standard fee-for-service basis, and none could find an attorney willing to represent them on some reduced-cost or *pro bono* basis." Stipulation, ¶ 21 (Pet. App. A50). That is hardly surprising since IDEA cases are complicated, fact-intensive, time-consuming and pit parents against resource-rich opponents. *See id.* ¶¶10, 13, 14 (Pet. App. A46-A48). Thus, even though IDEA contains a fee-shifting statute, the obstacles to victory are sufficiently daunting to discourage lawyers from taking on these cases. And there is no dispute that the demand for legal assistance in IDEA cases far outstrips the availability of lawyers. Without non-lawyer assistance, the "right" to a hearing guaranteed by the Act becomes, for most parents, a right in name only. *See id.* ¶¶26-28 (Pet. App. A50-A51) (explaining why parents denied legal assistance would forego their right to a hearing).

Unless the decision below is set aside, IDEA's goal of giving parents the ability to participate fully in charting their child's educational destiny will be thwarted, and the rights of virtually every parent of a disabled child in the nation will be thrown into question. As the United States emphasized in its brief to the Supreme Court of Delaware, denying parents the right to non-lawyer assistance "frustrates" and "unquestionably subverts" the Act and therefore "cannot stand." U.S. Amicus Br. at 27.

2. The Failure of the Court Below to Defer to the Department of Education Jeopardizes the Uniform Enforcement of IDEA.

Until the ruling below, every court to address questions relating to the interpretation and implementation of IDEA has given considerable deference to the Department of Education's

views. As the Petition points out, this Court has always looked to the Department for guidance in cases challenging the adequacy of a state's, or local school board's, compliance with the Act. Petition at 16 (citations omitted). And almost invariably, those views are adopted by the courts. As a result, the Act is administered uniformly nationwide.

The Supreme Court of Delaware, however, has broken ranks and essentially disregarded the Department of Education's views. The Department made two arguments below: first, that the text, structure, and purpose of IDEA compelled the conclusion that the Act authorized non-lawyer representation; and second, that a contrary ruling would stand as an obstacle to the fulfillment of the overriding federal interest in empowering parents to challenge adverse school board decisions, and hence would be preempted.

As to the statutory construction issue, the court below gave, at most, lip service to the Department's interpretation. Although the court cited *Chevron, USA, Inc. v. NRDC,* 467 U.S. 837, 843-45 (1984), it nonetheless concluded that it owed at most "modest" deference to the Department's views, and then noted that even "less deference is due" because the agency's statements were "informal." Pet. App. at A10-A11. In fact, the court simply brushed aside the Department's views and substituted its own contrary judgment, even though the Department had articulated the basis for its construction of the Act in a detailed 1981 opinion letter, a thirty-five page amicus brief, and a series of administrative rulings. The Delaware court's approach cannot possibly be reconciled with this Court's rulings regarding deference.

As to the Department's preemption argument, the Supreme Court of Delaware made no pretense at all of considering the Department's position that barring lay

advocates from IDEA hearings would "substantially frustrate" and "unquestionably subvert" the accomplishment of an important federal objective. U.S. Amicus Br. at 26-27. This Court has repeatedly driven home the point that federal agencies are "uniquely qualified to determine whether a particular form of state law" frustrates federal objective. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996); *accord Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1926-27 (2000). Nonetheless, the Delaware Supreme Court entirely ignored the Department's preemption argument.

As a result, IDEA, a federal statute of undeniable importance to more than 8 million American families, will be interpreted in a piecemeal and widely varying manner depending solely on the state in which a disabled child resides. Although IDEA's implementation and enforcement is, at least in the first instance, carried out by the states, the federal government has ultimate supervisory responsibility under the Act. It has always served as a bulwark to ensure that parents do not get shortchanged by states and local school boards, which have strong financial incentives to deny costly services to disabled children. *See Cedar Rapids Community Sch. Dist. v. Garrett F.*, 119 S. Ct. 992, 999-1000 (1999); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 892 (1984). And, until now, the courts have respected the Department's role as principal arbiter of the Act's meaning.

The ruling below turns that understanding upside down, by rejecting as almost immaterial the Department's views on the meaning of one of IDEA's pivotal provisions and on the impact a ruling barring lay advocates will have on the accomplishment of the Act's objectives. The message sent to parents by the Supreme Court of Delaware is that the federal government is no longer the guarantor of the procedural rights of parents and children under IDEA; rather, their fate is in the

hands of state courts, which have less expertise in the interpretation and enforcement of federal laws, and little interest in the uniform administration of federal law. Because that message is wrong as a matter of law, this case merits review by this Court.

CONCLUSION

For the reasons stated above and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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